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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059220
Party	Plaintiff Red Bull GmbH
Correspondence Address	MARTIN R GREENSTEIN TECHMARK A LAW CORPORATION 4820 HARWOOD ROAD, 2ND FLOOR SAN JOSE, CA 95124 UNITED STATES MRG@TechMark.com, LZH@TechMark.com, AMR@TechMark.com
Submission	Opposition/Response to Motion
Filer's Name	Leah Z. Halpert
Filer's e-mail	MRG@TechMark.com, LZH@TechMark.com, AMR@TechMark.com, DMP@TechMark.com
Signature	/Leah Z. Halpert/
Date	10/31/2014
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that Red Bull's Opposition to Applicant's Motion to Dismiss is being filed with the TTAB via ESTTA on the date set forth below.

Date: October 31, 2014

/Leah Z. Halpert/
Leah Z. Halpert

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH,	)	Consolidated Matter: 91-210,282
Opposer/Petitioner,	)	Oppo. No. 91-210,282 (Parent)
v.	)	Oppo. No. 91-214,537 (Child)
STOCKMARKET BURGER, INC.,	)	Canc. No. 92-059,220 (Child)
Applicant/Respondent.	)	Marks:
	)	Bull & Swirl Design (#85/680,816)
	)	STOCKMARKET & Bull Des (#85,969,820)
	)	STOCKMARKET & Bull Des (#4,481,899)
	)	Serial Nos.:
	)	85/680,816
	)	85/969,820
	)	4,481,899

RED BULL'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS
CANCELLATION NO. 92-059,220

Opposer/Petitioner, RED BULL GMBH ("Red Bull" or "Petitioner") submits this brief in opposition to Applicant/Respondent's ("Respondent") meritless and untimely Motion to Dismiss in the Child Cancellation No. 92-059,220 ("Motion to Dismiss"). As discussed herein, even a cursory review of the complaint shows that it is legally sufficient. Accordingly, Red Bull respectfully requests that Respondent's frivolous motion – clearly made solely to further delay these proceedings and burden Red Bull and the Board – be denied in its entirety and that Respondent be ordered, again, to file an answer in Cancellation No. 92-059,220.

PRELIMINARY STATEMENT

Respondent's Motion to Dismiss is a spurious attempt to once again delay the cancellation proceedings and avoid its Board ordered obligations to answer Red Bull's Petition

for Cancellation¹ until its motion in the related opposition proceeding has been resolved.² Respondent has already attempted this once with a Motion to Suspend the cancellation proceedings, and was unsuccessful. *See* Board Order, Docket No. 9, Cancellation. No. 92-059,220 (September 16, 2014).³ This second attempt, inaccurately captioned as a Motion to Dismiss based on Fed. R. Civ. P. 12(b)(6) (but upon review clearly an attempt to evade the Board's direct order⁴ and file an untimely motion for judgment, whether it be summary judgment or judgment on the pleadings) should not be condoned, and Respondent's Motion should be dismissed. Further, in light of Respondent's repeated attempts to unnecessarily burden Red Bull and the Board with these motions, Red Bull respectfully requests that Respondent be barred from filing any further motions in the consolidated proceeding without prior consent from the Board.

Additionally, Respondent erroneously attempts to limit the breadth of Red Bull's RED BULL and Bull Logo Marks by inappropriately and mistakenly arguing that Red Bull's relied-upon common law design marks should not be considered. If Respondent found the descriptions of Red Bull's common law designs to be vague, the proper vehicle to challenge these descriptions was through a Motion for a More Definite Statement rather than a Motion to Dismiss [or even simply contacting Red Bull to request an amended Petition for Cancellation in order to clarify what Respondent deemed to be "ambiguous"]. Respondent's actions, however, evidence that its claims that portions of the Petition for Cancellation are "ambiguous" are merely

¹ *See* Board Order, Docket No. 9 at 4-5, Cancellation No. 92-059,220 (September 16, 2014).

² In the Parent case – Opposition No. 91-210,282 – Respondent filed a Motion for Partial Judgment on the Pleadings. This motion has been fully briefed and, per the Board's September 16, 2014 order, the entire consolidated matter is currently suspended pending its disposition.

³ The same Board Order was subsequently filed in the Parent Opposition 91-210,282 as Docket No. 22, dated September 17, 2014.

⁴ Respondent further ignored the direct Board Order by filing its motion only in the Child cancellation. As stated in the September 16, 2014 Board Order "Stockmarket is directed to file said answer in Cancellation No. 92059220. This directive is **a sole exception** to the instruction set forth above (and in the Board's March 13, 2014 order in Opposition No. 91210282) that all submissions must be filed in parent opposition No. 91210282." (emphasis added).

an attempt to prejudice the Board against Red Bull, and should be ignored in ruling on this motion.⁵ Clearly, Respondent was able to fully understand the pleadings as written, else the appropriate Motion would have been filed instead of this thinly veiled attempt at a motion for summary judgment.

Respondent's Motion to Dismiss is not well-founded, serves only to delay the proceedings, shirks Respondent's clear mandate to answer the Petition for Cancellation, and imposes unnecessary burdens on Red Bull and the Board. As such, Red Bull respectfully requests that the Motion to Dismiss be denied in its entirety and Respondent be barred from filing any further motions without first obtaining approval from the Board.

ARGUMENT

Respondent captions its motion as a Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). Motion to Dismiss at 1. A Fed. R. Civ. P. 12(b)(6) motion is a motion to dismiss for failure to state a claim upon which relief can be granted and serves solely to test the legal sufficiency of the complaint. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014); *Corporacion Habanos SA v. Rodriquez*, 99 USPQ2d 1873, 1874 (TTAB 2011); *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009) (quoting, *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007)); TBMP 503.02. A cursory review of Respondent's Motion to Dismiss shows that it is not, in fact, intended to test the sufficiency of the complaint, but rather to surreptitiously evade clear rules and long-standing precedent to prematurely have the Board issue a judgment on the merits. Such a motion for judgment is entirely untimely and inappropriate as Respondent has yet to even

⁵ Should the Board deem the Petition for Cancellation to be ambiguous in regard to the full meaning of the "RED BULL and Bull Logo" marks, Red Bull respectfully requests leave to amend the Petition for Cancellation.

answer despite the Board's clear order that it do so. TBMP §§ 504.02, 528.02.⁶ In light of this fact, Respondent's arguments that go to the merits of the matter and are not related to whether the Petition for Cancellation is legally sufficient should not be considered, and Red Bull, herein, only argues as to the legal sufficiency of its Petition for Cancellation.⁷

Notwithstanding Respondent's wholly inappropriate and untimely arguments – which due to their untimely nature, this response does not consider or give merit to – Red Bull's Petition for Cancellation is legally sufficient. In order to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only allege facts as would, if proved establish the plaintiff is entitled to the relief sought. That is, Red Bull need only allege that (1) Red Bull has standing to maintain the proceeding, and (2) a valid ground exists for cancelling the subject registration. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982); *Corporacion Habanos SA v. Rodriquez*, 99 USPQ2d 1873, 1874 (TTAB 2011); *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009); *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theaters*, 56 USPQ2d 1538, 1539 (TTAB 2000); *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 USPQ2d 1460, 1462 (TTAB 1992); *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1990). Respondent's Motion inappropriately argues the merits of the matter. However, the appropriate standard for a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is not whether a plaintiff can actually prove its allegations at this point in the proceeding. Providing evidence during pleadings is inappropriate, as proof is a matter to be

⁶ A motion for judgment on the pleadings cannot be filed until after the close of pleadings. TBMP § 504.02. A motion for summary judgment cannot be filed until a party's initial disclosures have been filed. TBMP § 528.02. In both cases, Respondent must file at least an answer prior moving for judgment of any kind.

⁷ This is not to say that Red Bull agrees in any way, with any of the arguments put forth by Respondent in its Motion. Rather, Red Bull is simply focusing this opposition to the Motion on the appropriate legal standard to show that the Petition for Cancellation is legally sufficient and not giving any merit whatsoever to Respondent's dubious attempt to untimely and inappropriately obtain a judgment on the matter at this time.

determined at final hearing or upon summary judgment after the parties have had an opportunity to submit evidence in support of their respective positions. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 n.3 (TTAB 2014). Instead, in determining a motion to dismiss, it is the duty of the Board to examine the complaint in its entirety, construing the allegations therein so as to do justice, as required by Fed. R. Civ. P. 8(e), to determine whether it contains any allegations, which, if proved, would entitle the plaintiff to the relief sought. *IdeasOne Inc. v. Nationwide Better Health*, 89 USPQ2d 1952, 1953 (TTAB 2009); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1539 (TTAB 2007). Here, the Petition for Cancellation clearly contains allegations that if proven as true, would entitle Red Bull to the cancellation of Respondent's Registration.

The TBMP enumerates numerous ways a plaintiff can sufficiently plead standing. TBMP § 309.03(b). Among them, as was done here, is alleging "a claim of likelihood of confusion that is not wholly without merit, including claims based on . . . prior use of a confusingly similar mark," *Id.* Here, Red Bull alleges in the Petition for Cancellation, *inter alia*, the following:

Petitioner Red Bull is the owner of the corporate name, trade name and trademark RED BULL, having used said name, mark and logo continuously in interstate commerce on and in connection with its beverages, energy drinks, sports drinks, soft drinks, various items of clothing, restaurant services, café services, bar services, and cocktail lounge services, and various other products and services related or complementary thereto since long prior to the October 8, 2012 claimed first use date of Registrant's STOCKMARKET & Bull Logo Marks. Petitioner for Cancellation ¶ 2.

Since long prior to the October 8, 2012 claimed first use date in U.S. commerce of Registrant's STOCKMARKET & Bull Logo Mark, petitioned to be cancelled herein, Petitioner Red Bull has continuously used the RED BULL and Bull Logo Marks⁸ in interstate commerce on or in connection with beverages, energy drinks, sports drinks, soft drinks, various items of clothing, restaurant services, café

⁸ The RED BULL and Bull Logo Marks are defined at paragraphs 3-7 of the Petition for Cancellation.

services, bar services, and cocktail lounge services, and various other products and services related or complementary thereto. *Id.* ¶ 8.

Registrant's STOCKMARKET & Bull Logo Mark so resembles Petitioner Red Bull's RED BULL and Bull Logo Marks as to be likely, when applied to the services of Reg. No. 4,481,899, to cause confusion, mistake or deception among purchasers, users, and the public, thereby damaging Red Bull. *Id.* ¶ 18.

The services on which Registrant asserts a bona fide use in commerce of Registrant's STOCKMARKET & Bull Logo Mark are identical or very similar to, used for the same or similar purposes, and/or are or will be advertised and promoted to and directed at the same trade channels, the same purchasers, and are or will be used in the same environment as Petitioner Red Bull's products and related goods and services. *Id.* ¶ 19.

Simultaneous use of Registrant's STOCKMARKET & Bull Logo Mark on the services set forth in Reg. No. 4,481,899 and Petitioner Red Bull's RED BULL and Bull Logo Marks on its goods and services as set forth above is likely to cause confusion, mistake or deception among purchasers, users, and the public, thereby damaging Red Bull. *Id.* ¶ 20.

From this, Red Bull has clearly satisfied the standing requirement, as well as fully pleaded a claim of likelihood of confusion that is reasonably based in fact – meeting both criteria for sufficiently pleading a claim upon which relief can be granted.⁹ Red Bull's Petition for Cancellation is legally sufficient and therefore Respondent's Motion must be denied in its entirety.

CONCLUSION

Based on the above, Red Bull's Petition for Cancellation is legally sufficient, thus overcoming Respondent's Motion to Dismiss. Further, Respondent's motion – captioned as a motion to dismiss, but in actuality an untimely and inappropriate motion for judgment -- is entirely meritless and an inappropriate effort to delay proceedings, avoid filing the answer ordered by the Board, and impose unnecessary burdens on both Red Bull and the Board. Red

⁹ In addition to Red Bull's well-pleaded claim of priority and likelihood of confusion, along with allegations of fact which, if proven, would entitle Opposer to the relief sought, *see* Petition for Cancellation ¶¶ 17-23, Red Bull has also sufficiently pleaded the additional ground of nonuse and false declaration. *See Id.* ¶¶ 24-29.

Bull respectfully requests that Respondent's Motion be denied in its entirety and Respondent be barred from filing further motions without prior approval from the Board.

Should the Board determine that Applicant's arguments in its motion for judgment (again, whether summary judgment or judgment on the pleadings) are, in fact, timely, Red Bull respectfully requests time to respond to substantively respond to those arguments.

Date: October 31, 2014

Respectfully submitted,
RED BULL GMBH
By: /Martin R. Greenstein/
Martin R. Greenstein
Leah Z. Halpert
Angelique M. Riordan
TechMark a Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124-5274
Tel: 408-266-4700; Fax: 408-850-1955
Email: MRG@TechMark.com
Attorneys for Red Bull

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RED BULL'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS CANCELLATION NO. 92-059,220** is being served on October 31, 2014, by first class mail, postage prepaid on Applicant's Correspondent of Record at the Correspondent's address of record below, with courtesy copy via email to Paulo@patelalmeida.com and Alex@patelalmeida.com:

Paulo A. de Almeida
Patel & Almeida, P.C.
16830 Ventura Blvd, Suite 360
Encino, CA 91436

/Leah Z. Halpert/
Leah Z. Halpert